Supreme Court, U.S.
FILED

No. _____ 091223 APR 9 - 2010

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In The

Supreme Court of the United States

LIBERTARIAN PARTY, *et al.*,

Petitioners,

v.

JAY DARDENNE,
Louisiana Secretary of State,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state officials sued in their official capacities for prospective relief under 42 U.S.C. § 1983 and *Ex parte Young*, 209 U.S. 123 (1908), are subject to service of process as individuals under Rule 4(e) or must be served as states under Rule 4(j).

2. Whether the Fifth Circuit erred by requiring that Petitioners submit evidence to overcome a motion to dismiss based on mootness under Rule 12(b).

3. Whether the Fifth Circuit erroneously determined that Petitioners' challenge to Louisiana's exclusion of their presidential candidates from the 2008 ballot is moot because it is not "capable of repetition yet evading review."

LIST OF PARTIES

The names of the Petitioners are:

Libertarian Party, Libertarian Party of Louisiana, Bob Barr, Wayne Root, Socialist Party USA, and Brian Moore.

The name of the Respondent is:

Jay Dardenne, in his official capacity as Louisiana Secretary of State.

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PETITION FOR WRIT OF CERTIORARI

Petitioners seek a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Fifth Circuit (entered January 21, 2010 with rehearing denied on March 15, 2010), affirming the District Court's dismissal of Petitioner's Complaint under Federal Rule of Civil Procedure 12(b) and denying Petitioners' motion for costs and attorney's fees under Federal Rule of Civil Procedure 4(d).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Haynes, Stewart and Dennis, JJ.) is reported at 595 F.3d 215 (5th Cir. 2010), and is included in the Appendix. *See* App., *infra*, at 1. The final judgment of the United States District Court for the Middle District of Louisiana is not reported and is reproduced in the Appendix. *See* App., *infra*, at 10.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 21, 2010. Rehearing was denied on March 15, 2010. *See* App., *infra*, at 26. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

U.S. Const., art. II, § 1, cl. 2:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,. . . .

La. Rev. Stat. § 18:401.1:

> A. Due to the possibility of an emergency or common disaster occurring before or during a regularly scheduled or special election, and in order to ensure maximum citizen participation in the electoral process and provide a safe and orderly procedure for persons seeking to qualify or exercise their right to vote, to minimize to whatever degree possible a person's exposure to danger during declared states of emergency, and to protect the integrity of the electoral process, it is hereby found and declared to be necessary to designate a procedure for the emergency suspension or delay and rescheduling of qualifying, early voting, and elections.
>
> B. The governor may, upon issuance of an executive order declaring a state of emergency or impending emergency, suspend or delay any qualifying of candidates, early voting, or elections. The governor shall take such action only upon the certification of the secretary of state that a state of emergency exists. A clerk of court, as the chief election officer of the parish, may bring to the attention of the secretary of state any difficulties

occurring in his parish due to natural disasters.

La. Rev. Stat. § 29:724.D(1):

> In addition to any other powers conferred upon the governor by law, he may do any or all of the following:
>
> Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency.

Federal Rule of Civil Procedure 4(d):

> **Waiving Service.**
>
> **(1)** ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons.
>
> . . .
>
> **(2)** ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the

United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

. . .

Federal Rule of Civil Procedure 4(e):

Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

> **(C)** delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Federal Rule of Civil Procedure 4(j):

> **Serving a Foreign, State, or Local Government.**
>
> . . .
>
> **(2)** ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:
>
> **(A)** delivering a copy of the summons and of the complaint to its chief executive officer; or
>
> **(B)** serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

STATEMENT OF THE CASE

Petitioners filed suit under 42 U.S.C. § 1983, Article II, § 1, cl. 2, of the United States Constitution, and the First and Fourteenth Amendments, against Respondent, Louisiana's Secretary of State, in his official capacity, on September 15, 2008. They sought prospective relief, claiming that the Secretary had unconstitutionally refused their qualifying papers for Louisiana's presidential ballot.

Hurricane Gustav hit Louisiana over the 2008 Labor Day weekend. It closed the state's offices on the day presidential qualifying papers were due, September 2, 2008, *see* La. Rev. Stat. § 18:1253(E), and for several days thereafter. For this reason, the Governor of Louisiana, acting pursuant to an express delegation of power from the Legislature, *see* La. Rev. Stat. § 29:724.D(1), on August 29, 2008, issued an Executive Order (BJ 08-92) extending deadlines in all "legal, administrative and regulatory proceedings" to September 12, 2008. Petitioners, the Libertarian Party of Louisiana and Socialist Party USA, filed their qualifying papers with the Secretary by this September 12, 2008 deadline.

Upon reopening on Monday, September 8, 2008, however, the Secretary announced a different deadline – September 8 – for presidential qualifying papers. Because they had no warning, were still suffering from the aftermath of Hurricane Gustav, and had relied on the Governor's previously announced September 12 deadline, neither the Libertarian nor Socialist Parties qualified their presidential candidates by this date.

Petitioners' complained that the Secretary lacked constitutional authority under Article II, § 1, cl. 2, of the United States Constitution to establish a deadline, let alone shorten the one put in place by the Governor pursuant to his statutory authority. Article II delegates to the state "Legislature" the power to regulate presidential elections. *See Bush v. Gore,* 531 U.S. 98, 111 (2000) (C.J., concurring); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77

(2000); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1011 (S.D. Ohio 2008) (holding that secretary of state has no authority under Article II to set deadline in presidential election).

Faced with a natural disaster that closed the state's offices from September 1 through September 7, 2008, Petitioners argued below, Louisiana's Governor properly exercised authority delegated to him by the Legislature. The Secretary, in contrast, possessed no delegated authority to establish a deadline, and ignored Louisiana's two statutory delegations to the Governor to establish emergency deadlines. *See* La. Rev. Stat. § 29:724.D(1); *id.* § 18:401.1.

The District Court issued a preliminary injunction on September 22, 2008 placing the Libertarian Party's presidential ticket on the ballot.[1] *See* App., *infra*, at 12. The Secretary took an emergency appeal on September 25, 2008. *Id.* The Fifth Circuit on September 26, 2008 stayed the injunction. *Id.* The Libertarian Party sought emergency relief from this Court, but the Court refused to intervene on October 7, 2008. *See* 129 S. Ct. 359 (2008). The election was held on November 4, 2008 without the Petitioners' presidential candidates' names on the ballot.

Acting pursuant to Rule 4(d), Petitioners had (contemporaneously with filing their complaint)

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[1] It did not order the Socialist Party's candidates on the ballot because it questioned whether they otherwise satisfied Louisiana's ballot access requirements.

requested that the Secretary waive service of process. The Secretary refused. Petitioners thereafter served the Secretary under Rule 4(e) and moved the District Court to award costs and attorney's fees as provided in Rule 4(d).

Following the election, the District Court granted the Secretary's Rule 12(b) motion to dismiss. It concluded that the case was moot notwithstanding the "capable of repetition yet evading review" doctrine. App., *infra,* at 18. It also denied Petitioners' Rule 4(d) motion for costs and fees, holding that Rule 4(e) (and hence Rule 4(d)) does not apply to state officials sued in their official capacities under 42 U.S.C. § 1983. *Id.* at 24.

The Fifth Circuit affirmed on both points. It concluded that the controversy was moot and did not qualify under the "capable of repetition yet evading review" exception. App., *infra,* at 8. It rejected Petitioners' "capable of repetition" argument because, it concluded, Petitioners did not prove "either a 'demonstrated probability' or a 'reasonable expectation,' that they will 'be subject to the same [unlawful governmental] action again.)'" *Id.* at 4-5 (citations omitted).

Petitioners' alleged that Louisiana had experienced at least ten named hurricanes over the course of the last twenty years – all in late August and September – had election dates and qualifying deadlines altered by the Secretary in the past, has two statutes specifically designed to address the problem

of deadlines and natural disasters (like hurricanes), *see* La. Rev. Stat. § 29:724.D(1); *id.* § 18:401.1, will likely have elections and candidates' qualifying deadlines disrupted by storms in the future, and will continually need dates and deadlines modified. Still, the Fifth Circuit concluded the case was moot: "At most, [Petitioners'] evidence shows that the Secretary will have an opportunity to act in the same allegedly unlawful manner in the future; however, it does not show a reasonable probability that the Secretary will act in that manner if given the opportunity." *See* App., *infra,* at 5.

The Fifth Circuit reasoned that something more than a mere "opportunity" was needed. Petitioners needed to present evidence

> showing that the Secretary had unlawfully changed filing deadlines in the past, that the Secretary's actions reflect a policy or a consistent pattern of behavior that he has determined to continue, or that the Secretary's action was prescribed by statute, which is the type of evidence presented in most election law cases that fall under the exception.

Id. at 7. Because Petitioners failed to present this "evidence," they did not satisfy their burden of proving the case was not mooted by the election.

The Fifth Circuit made much of the fact that the challenged wrongdoing constituted an executive decision. Hence, a more demanding "likelihood of recurrence" standard was appropriate:

> [u]nlike most election law cases, [Petitioners'] case does not involve a challenge to a governmental action done pursuant to an election statute. These challenges are often able to survive mootness under the exception because courts will assume that the government will enforce the same statute in the future. In cases such as this, where the challenged governmental action was not done pursuant to a statute, such an assumption cannot be made, so [Petitioners] cannot simply rely on general election law cases to support their assertion that the exception applies.

Id. at 6-7 n.6.

Relying on the Fifth Circuit's recent decision in *Moore v. Hosemann*, 591 F.3d 741, 746-47 (5th Cir. 2009), *cert. filed,* 78 U.S.L.W. 3501 (Feb. 17, 2010) (No. 09-982), the court also rejected Petitioners' Rule 4(d) claim to costs and fees. According to *Moore,* state officials sued in their official capacities for prospective relief under § 1983 are the state; they therefore must be served under Rule 4(j). Because Rule 4(e) does not apply, neither does the waiver provision in Rule 4(d). App., *infra,* at 8.

REASONS FOR GRANTING THE WRIT

I. The Circuits are Split Over Whether Rule 4(e) Applies to State Officials Sued in Their Official Capacities for Prospective Relief Under 42 U.S.C. § 1983.

Rule 4(d) requires that defendants either waive service or suffer the plaintiff's costs. *See* Fed. R. Civ. P. 4(d)(2). Not all defendants, however, are required to waive service. According to Rule 4(d), only those defendants subject to service under Rules 4(e), (f), and (h) are subject to this duty. In particular, the United States, which must be served under Rule 4(i), is not subject to Rule 4(d). Likewise, state and local governmental defendants "subject to suit" are served under Rule 4(j).

The First and Second Circuits have concluded that state officials sued in their official capacities for prospective relief under 42 U.S.C. § 1983 are subject to service as individuals under Rule 4(e). The First Circuit explained in *Echevarria-Gonzalez v. Gonzalez-Chapel,* 849 F.2d 24, 29 (1st Cir. 1988), that official-capacity claims against state officials are governed by the Rule applicable to individual service, at that time Rule 4(d)(1):[2]

> Although we imagine that in most or all cases where a state officer is sued in his

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[2] Rule 4(d)(1)'s requirements for individual service are now included in Rule 4(e). *See Caisse v. DuBois,* 346 F.3d 213, 216 (1st Cir. 2003).

> official capacity, the state has a major interest in the outcome, the officer remains the actual party to the action. A state officer is often sued in his official capacity because the Eleventh Amendment forbids a direct action against the state. *See Ex Parte Young*, 209 U.S. 123 (1908).

The court explained that "[i]f the Eleventh Amendment bars an action against the state, then the latter is not 'subject to suit' pursuant to Rule 4(d)(6), and thus the rule is inapplicable." *Id.* (citing C. WRIGHT & A. MILLER, 4A FEDERAL PRACTICE & PROCEDURE § 1110 (1987)).[3] The court therefore concluded:

> The action is against an individual, albeit in his official capacity, and not against the state. Although the state . . . has a great interest in the outcome, it will be the individual . . . who in an official capacity is going to be bound by the judgment, and who can be held in contempt if a court order is disobeyed. . . . We therefore hold that service upon a state officer in his official capacity is sufficient if made pursuant to Rule 4(d)(1).

Id. 29-30.

The First Circuit reiterated this conclusion in *Caisse v. DuBois*, 346 F.3d 213 (1st Cir. 2003), a § 1983 prison conditions action filed against state

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[3] Rule 4(d)(6)'s provisions for serving government are now included in Rule 4(j).

corrections officers in both their individual and official capacities. The First Circuit expressly rejected the claim that Rule 4(j) applied: "service of process for public employees sued in their official capacities is governed by the rule applicable to serving individuals." *Id.* at 216. The Court accordingly ruled that "to serve the defendants in either an individual or official capacity, [the plaintiff] had to comply with Fed. R. Civ. P. 4(e) providing for service of process on individuals." *Id.*

The Second Circuit has endorsed this result. In *Stoianoff v. Commissioner of Motor Vehicles*, 208 F.3d 204 (2d Cir. 2000) (Table) (2000 WL 287720), where a *pro se* plaintiff failed to comply with Rule 4(j) when serving a state official sued in his official capacity, the Second Circuit observed: "service here may be effected pursuant to Rule 4(e), which provides for service upon individuals generally. *See, e.g.*, *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28-30 (1st Cir. 1988) (holding that service on state officer in his official capacity is sufficient if made pursuant to predecessor to Rule 4(e)."). [4]

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[4] Several district courts have held that because Rule 4(e) applies to official-capacity actions under § 1983, Rule 4(d)(2)'s waiver requirement also applies. *See, e.g., Marcello v. Maine*, 238 F.R.D. 113, 115 (D. Me. 2006) (holding that § 1983 action against a state judge in his official capacity was governed by Rule 4(e) and hence Rule 4(d)); *Whatley v. District of Columbia*, 188 F.R.D. 1, 2 (D.D.C. 1999) (holding that "municipal government employees are subject to Rule 4(d)(2) of the Federal Rules of Civil Procedure when sued in both their individual and official

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The Fifth Circuit here relied on its previous decision in *Moore v. Hosemann*, 591 F.3d 741, 746-47 (5th Cir. 2009), *cert. filed,* 78 U.S.L.W. 3501 (Feb. 17, 2010) (No. 09-982), which expressly rejected the First Circuit's interpretation of Rules 4(e) and 4(j). *See* App., *infra*, at 8. In *Moore,* the Fifth Circuit drew an equation between suits against federal agents, which are subject to the service requirements of Rule 4(i),[5] and suits against state officers. "[T]he most reasonable reading of rule 4 affords state officers facing official capacity suits the same consideration given to federal officers in the same position." *Moore,* 591 F.3d at 747.

As pointed out by the First Circuit in *Echevarria-Gonzalez,* 849 F.2d at 29, this logic ignores the plain language of Rule 4(j), which requires that state governmental defendants must be "subject to suit" for its service requirements to apply. The law has been clear for one hundred years that states and their agencies are protected by the Eleventh Amendment; they are not subject to suit in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 16 (1890) ("The suability of a State . . . was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally

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capacities"); *Mosley v. Douglas County Correctional Center*, 192 F.R.D. 282, 283-84 (D. Neb. 2000) (same).

[5] Rule 4(i)(2) provides that when a federal officer is sued in an official capacity, the United States must be served under Rule 4(i)(1).

asserted."). Only by suing a state official by name under the fiction of *Ex parte Young*, 209 U.S. 123, 159-60 (1908) (stating that when sued for injunctive relief for violating the Constitution the state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct"), can one avoid the Eleventh Amendment – and this is precisely because official-capacity suits are *not* suits against states.

This constitutional distinction between states and their officials was extended as a statutory matter to § 1983 litigation in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There, this Court ruled that states are *never* proper defendants under § 1983. Rather, a § 1983 plaintiff must sue a state official by name in his official capacity. This is proper "because 'official-capacity actions for prospective relief *are not treated as actions against the State*.'" *Id.* at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)) (emphasis added).[6]

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[6] Official-capacity actions against states and/or state officers for money damages are not cognizable under § 1983. *See Will*, 491 U.S. at 71. Thus, the *only* recognized official-capacity action against a state officer under § 1983 is that authorized by *Ex parte Young*. *See Will*, 491 U.S. at 71 n.10. Of course, state officials can be sued for money damages as individuals. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). There is no question but that these "individual-capacity" actions are governed by Rule 4(e). If an individual-capacity action calls into doubt a state statute, Rule 5.1(a) requires that the state's attorney general be

(Continued on following page)

Because the Fifth Circuit's conclusions in *Moore v. Hosemann*, 591 F.3d 741 (5th Cir. 2009), *cert. filed*, 78 U.S.L.W. 3501 (Feb. 17, 2010) (No. 09-982), and below contradict that of the First and Second Circuits, certiorari is proper.

II. The Fifth Circuit Erred by Requiring Evidence to Rebut a Rule 12(b) Motion to Dismiss Based on Mootness.

The Fifth Circuit below repeatedly complained that Petitioners had not presented "evidence" to show that the Secretary was reasonably likely to fix election deadlines in the future. In doing so, it ignored the procedural posture of the case – dismissal under Rule 12(b).[7]

To use one example, the Fifth Circuit rejected Petitioners' claim that the Secretary assumed the power (albeit unconstitutionally) to alter deadlines,

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noticed. *See also* 28 U.S.C. § 2403(b) (providing that state must be allowed to intervene). *Compare* Federal Rule of Civil Procedure 4(i)(3) (federal officials sued in their individual capacities are subject to service as individuals under Rule 4(e) and United States must also be served).

[7] The Secretary's motion to dismiss did not state whether it relied on Rule 12(b)(1) or Rule 12(b)(6). Nor did the District Court's opinion clarify this point; rather, it simply dismissed under Rule 12(b). *See* App., *infra*, at 10 & 18 n.21. Under either, plaintiffs are entitled to have their allegations taken as true and all reasonable inferences drawn in their favor. Evidence is not required. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998).

this authority constituted "policy" under Louisiana law, and was likely to be exercised again in the future:

> Appellants state that the "Secretary's policy is that he has the authority to fix emergency election deadlines," but *they do not present any evidence* to support their assertion that the Secretary has such a policy. Appellants also state in their reply brief that "the Secretary's action clearly represents policy; at least the Secretary has never claimed it does not." The burden, however, is not on the Secretary to show whether his actions constitute policy; instead, the burden is on Appellants to show that the Secretary's actions were policy, and *Appellants have not presented any evidence* that would allow them to meet that burden in this case.

App., *infra,* at 7 n.5 (emphasis added).[8]

Given the posture of the present case, Petitioners are not required to present evidence. At the Rule 12(b) dismissal stage, all factual allegations are to be

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[8] It is clear that the Louisiana Secretary of State is a "final authority," *see McMillian v. Monroe County*, 520 U.S. 781, 787 (1997) (holding that sheriff was a final authority whose single decision made policy for Alabama), responsible for making policy in Louisiana in the context of elections. La. Const., art. 4, § 7 ("The secretary of state shall head the department and *shall be the chief election officer of the state. He shall prepare and certify the ballots for all elections, promulgate all election returns, and administer the election laws. . . .*") (emphasis added).

taken as true and all plausible inferences must be drawn in the plaintiff's favor. *See generally Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

This Court in *Bennett v. Spear*, 520 U.S. 154, 168 (1997), made clear that this same standard applies to Article III's jurisdictional issues:

> while a plaintiff must "set forth" by affidavit or other evidence 'specific facts' to survive a motion for summary judgment, . . . , [a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for *on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."*

(Emphasis added). *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998) ("This case is on appeal from a Rule 12(b) motion to dismiss on the pleadings, so we must presume that the general allegations in the complaint encompass the specific facts necessary to support those allegations.").

Here, Petitioners alleged that Louisiana had experienced at least ten named hurricanes over the course of the last twenty years (all in late August and September), had election dates and qualifying deadlines unilaterally altered by the Secretary in the past, has two statutes specifically designed to deal with the problem (hence showing that the Legislature realizes it will recur), will likely have elections and candidates' qualifying deadlines disrupted by storms in the

future, and will continually need dates and deadlines modified. Further, Petitioners assert for all these reasons that the Secretary will likely take it upon himself – contrary to Louisiana law and Article II – to move deadlines in the future.

These allegations and reasonable inferences present a plausible claim that the Secretary remains "capable" of altering election deadlines in the future. The Fifth Circuit's rejection of Petitioners' allegations for lack of evidence, as well as its requirement that evidence be presented at the dismissal stage to establish patterns of past wrongs and a likelihood of future wrongdoing, contradicts this Court's holdings in *Bennett*, *Steel Co.*, *Twombly*, and *Iqbal*. Certiorari is proper.

III. The Fifth Circuit Erred by Holding Non-Legislative Action to a More Demanding Standard Under the Capable of Repetition Doctrine.

Election controversies are routinely preserved by the "capable of repetition" exception. There is generally too little time to resolve ballot disputes or campaign finance controversies before the close of the election cycle – they "evade review" – and they frequently will recur if not resolved – making them "capable of repetition." *See, e.g., Norman v. Reed*, 502 U.S. 279 (1992); *Meyer v. Grant*, 486 U.S. 414 (1988); *Brown v. Chote*, 411 U.S. 452 (1973); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Moore v. Ogilvie*, 394 U.S. 814 (1969). Without the "capable of repetition"

doctrine, many election disputes – like the present one – would escape constitutional scrutiny.

This Court recently reiterated that the "capable of repetition yet evading review" doctrine, in the context of election cases, governs "as applied" challenges as well as facial attacks. *See Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 463 (2007). Moreover, this Court has never suggested that a more demanding analysis applies to as-applied challenges, let alone challenges directed at policies put in place by non-legislative actors.

For example, in *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), where a state judge issued a gag order preventing the press from reporting a criminal trial, the Court concluded that expiration of the order did not moot the case: "the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity. . . ." *Id.* at 546. "The dispute between the State and the petitioners who cover events throughout the State is thus 'capable of repetition.'" *Id.* at 547. *See also Gerstein v. Pugh*, 420 U.S. 103 (1975) (finding state judge's denial of probable cause hearing capable of repetition); *Gannette Co., Inc. v. DePasquale*, 443 U.S. 368 (1979) (holding judge's order closing proceedings capable of repetition).[9]

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[9] Nor has the Court even limited the "capable of repetition" doctrine to governmental action. In *Morse v. Republican Party of Virginia,* 517 U.S. 186, 235 n.48 (1996), for example, the Court

(Continued on following page)

In *Honig v. Doe*, 484 U.S. 305 (1988), to use another example, the plaintiffs prospectively challenged disciplinary action taken by school officials under the federal Education of the Handicapped Act. Even though the plaintiffs' child left the school district and was no longer threatened with expulsion, the Court concluded that his challenge to the school officials' disciplinary conduct was "capable of repetition yet evading review." *Id.* at 318-19. No state statute was challenged; rather, the challenge was directed at the school officials' executive action. *See also Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999) (holding that transfer of disabled plaintiff by state officials did not moot controversy under Americans With Disabilities Act and § 1983).

And in *Bradley v. Lunding*, 424 U.S. 1309 (1976), Justice Stevens (sitting in his capacity as Circuit Justice), stayed an Illinois election officials' executive decision to resolve ballot access priorities by lottery. Justice Stevens did not inquire whether the agency's decision was authorized by state statute, or somehow an application of statutory law; rather, he simply stated that the decision was "presumably" capable of repetition so that the intervening election would not moot the case. *Id.* at 1311-12.

The Fifth Circuit's application of a different, more demanding analysis to executive wrongdoing

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applied the doctrine to an ad hoc decision by the Republican Party to impose a $45 filing fee on convention delegates.

contradicts these precedents, as well as holdings in several circuits (including the Fifth). In *Moore v. Hosemann*, 551 F.3d 449 (5th Cir. 2009), *cert. filed*, 78 U.S.L.W. 3501 (Feb. 17, 2010) (No. 09-982), after all, the Fifth Circuit ruled that Mississippi's Secretary of State's decision to shorten Mississippi's filing deadline for presidential candidates was "capable of repetition." It did not apply a different, more demanding analysis.[10]

Nor did the Sixth Circuit apply a more demanding analysis in *American Civil Liberties Union of Ohio v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004), which held that Ohio's governor's refusal to call a special congressional (House) election was "capable of repetition" even though another regular election had been held and the 108th Congress had convened. The governor's ad hoc executive decision was not authorized by statute, nor was the governor applying an Ohio law. His refusal to call an election is identical in form to the Secretary's refusal here to accept Petitioners' qualifying papers in the present case.

Then-Judge Sotomayor in *United States v. Quattone*, 402 F.3d 304, 309 (2d Cir. 2005), likewise concluded that a judge's gag order – prohibiting the press from reporting jurors' names – was not mooted by the close of trial and expiration of the order: "We

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[10] Petitioners sought rehearing en banc because of this obvious conflict, but the Fifth Circuit declined further review. *See* App., *infra*, at 26.

agree with appellants that the order at issue in this case was too short in duration to be fully litigated prior to its expiration, and that there is a reasonable expectation that these same appellants will face a similar restrictive order in the future." It obviously did not matter to then-Judge Sotomayor that the gag order was put in place on an ad hoc basis by a non-legislative actor.

The Fifth Circuit's application of a more demanding standard contradicts this Court's, as well as Second and Sixth Circuit, precedents. Certiorari is proper.

IV. The Fifth Circuit Erroneously Confused Mootness With Standing.

This Court in *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988), observed that it has routinely "found controversies capable of repetition based on expectations that, while reasonable, *were hardly demonstrably probable*." (Emphasis added and citations omitted). The Court went on to state that its "concern in these cases, as in all others involving potentially moot claims, was whether the controversy was *capable* of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Id.* (emphasis in original).

Even though the Court in *Honig* did not precisely define "capable," it later in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000), gave the term meaning. *Laidlaw*

established that the "capable of repetition" doctrine requires less certainty than Article III standing: "The plain lesson . . . is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.*

The Court in *Laidlaw* used the "capable of repetition" doctrine as an example. "When . . . a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer . . . will not moot the action, despite the fact that she would have lacked initial standing had she filed the complaint after the transfer." *Id.* at 190-91 (citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999)). "*To abandon the case at an advanced stage may prove more wasteful than frugal.* This argument from sunk costs . . . surely highlights an important difference between the two doctrines." 528 U.S. at 191-92 (emphasis added).

The Fifth Circuit's approach erroneously conflates standing and mootness. As demonstrated by the Fifth Circuit's requirement that Petitioners "introduce[ ] evidence showing that the Secretary had unlawfully changed filing deadlines in the past, that the Secretary's actions reflect a policy or a consistent pattern of behavior that he has determined to continue, or that the Secretary's action was prescribed by statute," App., *infra,* at 7, it forced Petitioners to establish standing all over again after the election.

Several Circuits have rejected this approach. The Sixth Circuit in *American Civil Liberties Union v. Taft,* 385 F.3d 641, 646 (6th Cir. 2004), where the court concluded that the governor's refusal to call a special election was "capable of repetition," stated that "standing and mootness serve different purposes: . . . These different purposes are reflected in well-established exceptions to the mootness doctrine, including the doctrine that a case will not become moot if the injury is capable of repetition, while evading review." (Citing *Laidlaw*).

Becker v. Federal Elections Commission, 230 F.3d 381 (1st Cir. 2000), to use another example, made much of the *Laidlaw* distinction. Even though it concluded that Ralph Nader's standing to challenge the presidential debates presented a "close" question, *id.* at 386, it found his challenge was clearly not mooted by the 2000 election. Like most election challenges, it was "capable of repetition yet evading review." *Id.* at 389. The court warned against "conflating" the two inquiries, *id.* at 386 n.3, and stated that "questions of standing and questions of mootness are distinct, and it is important to treat them separately." *Id.*[11]

Conflating standing and mootness contradicts this Court's decision in *Laidlaw* as well as decisions

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[11] Chief Judge Torruella disagreed with the standing and mootness determinations. *See id.* at 397 (Torruella, C.J., concurring).

from the First and Sixth Circuits. Certiorari is proper.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

09-30307

LIBERTARIAN PARTY; LIBERTARIAN PARTY OF LOUISIANA; BOB BARR; WAYNE ROOT; SOCIALIST PARTY USA; BRIAN MOORE,

Plaintiffs-Appellants

v.

JAY DARDENNE, In His Official Capacity as Louisiana Secretary of State,

Defendant-Appellee

Appeal from the United States District Court for the Middle District of Louisiana

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(Filed Jan. 21, 2010)

Before STEWART, DENNIS, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Appellants – the Libertarian Party, the Socialist Party, and their candidates – appeal the district court's dismissal of their complaint as moot, and the district court's denial of their request for fees under

Federal Rule of Civil Procedure ("Rule") 4(d). Finding no reversible error, we AFFIRM.

I. FACTS AND PROCEDURAL BACKGROUND

Appellants were excluded from Louisiana's 2008 presidential ballot because they failed to file their qualifying papers by the applicable filing deadlines. Pursuant to a Louisiana statute, the filing deadline for the Socialist Party was September 2, and the filing deadline for the Libertarian Party was September 5. Because of Hurricane Gustav, the Louisiana Secretary of State (the "Secretary") unilaterally allowed parties to file their qualifying papers on September 8, 2008. Appellants did not file their papers until after the 8th of September. Because Appellants failed to file their papers by September 8, the Secretary informed Appellants that they would not be placed on Louisiana's 2008 presidential ballot. Appellants then brought this suit against the Secretary, seeking, among other things, a declaratory judgment stating that the Secretary's September 8 deadline was unconstitutional. Appellants contend that the Secretary lacked the power to set a deadline different from that of the statute unilaterally.[1]

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[1] Appellants do not contend, however, that the Secretary was *required* to set in motion the statutorily-prescribed method for extending a filing deadline, LA. REV. STAT. ANN. § 18:401.1.B (2009) (stating that the Governor of Louisiana and the Secretary, acting together, "may . . . suspend or delay any qualifying of candidates").

While this suit was pending before the district court, the 2008 presidential election passed, and, on that basis, the Secretary moved to dismiss Appellants' complaint as moot. Appellants argued that their complaint was not moot because their challenge to the Secretary's September 8 deadline fell under the "capable of repetition, yet evading review" exception to mootness. The district court rejected Appellants' argument and dismissed their complaint as moot.

Appellants also argued that they were entitled to costs and fees under Rule 4(d)'s mandatory waiver-of-service provision. The district court denied Appellants' motion for costs and fees, finding that the Secretary was not subject to Rule 4(d)'s mandatory waiver-of-service provision because he was sued in his official capacity.

II. DISCUSSION

In this appeal, Appellants challenge both the mootness finding and the Rule 4(d) decision. We address each in turn.

A. Mootness

Appellants contend that their request for a declaratory judgment stating that the Secretary's conduct was unconstitutional is not moot because it falls under the "capable of repetition, yet evading review" exception to mootness. *See Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir.

2006) (explaining that the "capable of repetition, yet evading review" exception is an exception to the rule that requires "'[t]he requisite personal interest that must exist at the commencement of litigation (standing) [to] continue throughout its existence (mootness)'" (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980))). There are two prongs to the "capable of repetition, yet evading review" exception, and Appellants, who are the plaintiffs, bear the burden of proving both prongs. *Davis v. FEC*, 128 S. Ct. 2759, 2769 (2008); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187-88 (1979) (showing that plaintiffs bear the burden of proof); *see Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("[T]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.").

Whether a case is moot is a question of law that we review de novo. *Bayou Liberty Ass'n v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 396 (5th Cir. 2000) (citing *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1989)). We find that Appellants have failed to meet their burden under the exception's "capable of repetition" prong.[2]

Under the exception's "capable of repetition" prong, Appellants "must show either a 'demonstrated

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[2] As a result, we need not reach the question of whether Appellants lack standing to contest the Secretary's allegedly unlawful act because they were not harmed by it.

probability' or a 'reasonable expectation,'" *Oliver v. Scott,* 276 F.3d 736, 741 (5th Cir. 2002), that they will "be subject to the same [unlawful governmental] action again," *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975). A "mere physical or theoretical possibility" is not sufficient to satisfy this prong of the exception. *Murphy v. Hunt,* 455 U.S. 478, 482 (1982). The allegedly unlawful governmental action in this case is the Secretary's unilateral establishment of a September 8 filing deadline. Appellants, therefore, must demonstrate that there is a "reasonable expectation" that the Secretary will again unilaterally change filing deadlines in the future.

Appellants primarily rely on evidence showing that Louisiana frequently encounters hurricanes and tropical storms during presidential qualifying periods to show that there is a reasonable expectation that the Secretary will unilaterally change filing deadlines in the future. At most, Appellants' evidence shows that the Secretary will have an opportunity to act in the same allegedly unlawful manner in the future; however, it does not show a reasonable probability that the Secretary will act in that manner if given the opportunity. By proving opportunity, Appellants have only demonstrated a "physical or theoretical possibility" that the Secretary may repeat his actions, and such a demonstration is insufficient to meet their burden under the "capable of repetition" prong. *Murphy,* 455 U.S. at 482; *McFarlin v. Newport Special Sch. Dist.,* 980 F.2d 1208, 1211 (8th Cir. 1992) (finding that evidence that there would be an opportunity for the

unlawful action to occur again was insufficient to show "a reasonable probability that the same" action would occur again).

Appellants also rely on our decision in *Moore v. Hosemann,* Nos. 09-60272 & 09-60424, 2009 U.S. App. LEXIS 27911 (5th Cir. Dec. 18, 2009) to show that they have satisfied the exception's requirements.[3] In *Moore,* we held that a challenge to the Mississippi Secretary of State's 5:00 p.m. deadline for filing was not moot because it was "capable of repetition, yet evading review." *Id.* at *6-*8. We found that the challenge in *Moore* was "capable of repetition" because the Mississippi Secretary of State "made it plain that he intend[ed] to enforce the 5:00 p.m. deadline in future elections." *Id.* at *8. Unlike the Mississippi Secretary of State, the Secretary here has not made it plain that he intends to unilaterally change filing deadlines in the future, and Appellants have not presented any evidence that would show such an intention.[4] Therefore, our decision in *Moore* does not save Appellants' complaint from mootness.

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[3] *Moore* was decided after oral argument in this case. Appellants addressed this case in a post-argument Rule 28(j) letter.

[4] Appellants, relying on an executive order issued by the Governor of Louisiana, contend that the Secretary's actions shortened the Governor's filing deadlines from September 12 to September 8. The Secretary disputes Appellants' contention; he asserts that his actions actually extended the filing deadlines and did not shorten them because the Governor's order did not extend the filing deadlines to September 12. We need not resolve

(Continued on following page)

Appellants could have satisfied their burden under the "capable of repetition" prong if they introduced evidence showing that the Secretary had unlawfully changed filing deadlines in the past, that the Secretary's actions reflect a policy or a consistent pattern of behavior that he has determined to continue,[5] or that the Secretary's action was prescribed by statute, which is the type of evidence presented in most election law cases that fall under the exception.[6] *Ill. State Bd. of Elections*, 440 U.S. at

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this dispute because the proper characterization of the Secretary's actions is immaterial to this decision. Regardless of whether the Secretary's actions were an extension or a shortening, Appellants' complaint is still moot because they have failed to meet their burden under the "capable of repetition" prong.

[5] In their reply brief, Appellants state that the "Secretary's policy is that he has the authority to fix emergency election deadlines," but they do not present any evidence to support their assertion that the Secretary has such a policy. Appellants also state in their reply brief that "the Secretary's action clearly represents policy; at least the Secretary has never claimed it does not." The burden, however, is not on the Secretary to show whether his actions constitute policy; instead, the burden is on Appellants to show that the Secretary's actions were policy, and Appellants have not presented any evidence that would allow them to meet that burden in this case.

[6] Appellants assert that their case is an election law case, so it automatically falls under the "capable of repetition, yet evading review" exception. Appellants' assertion, however, relies on the assumption that their case is like most election law cases. This assumption is incorrect. Unlike most election law cases, Appellants' case does not involve a challenge to a governmental action done pursuant to an election statute. *See, e.g., Davis*, 128 S. Ct. at 2770. These challenges are often able to survive

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188. Appellants have failed to present such evidence. Because we agree with the district court that Appellants have failed to present evidence that would allow them to meet their burden under the "capable of repetition" prong, we conclude that the district court did not err in dismissing Appellants' complaint as moot.

B. Denial of Costs and Fees Under Rule 4(d)

Appellants argue that the district court erred in denying their request for costsd [sic] fees under Rule 4(d) because the Secretary was sued for prospective relief in his official capacity and, therefore, subject to Rule 4(d)'s mandatory waiver-of-service provision. Appellants' argument is foreclosed by our recent decision in *Moore*. In that case, we held that "a state official sued in his official capacity is not subject to the mandatory waiver-of-service provisions of [R]ule 4(d)." 2009 U.S. App. LEXIS 27911 at *15. Accordingly, we conclude that the district court did not err in denying Appellants' motion for costs and fees under Rule 4(d).

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mootness under the exception because courts will assume that the government will enforce the same statute in the future. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007) ("[T]here is no reason to believe that the FEC will 'refrain from prosecuting violations' of BCRA."). In cases such as this, where the challenged governmental action was not done pursuant to a statute, such an assumption cannot be made, so Appellants cannot simply rely on general election law cases to support their assertion that the exception applies.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LIBERTARIAN PARTY, LIBERTARIAN PARTY OF LOUISIANA, BOB BARR, WAYNE ROOT, SOCIALIST PARTY USA, BRIAN MOORE, STEWART ALEXANDER

VERSUS

JAY DARDENNE,
In his official capacity as
Louisiana Secretary of State

CIVIL ACTION
NO. 08-582-JJB

RULING ON MOTIONS

This matter is before the court on a Motion to Dismiss Case as Moot (Doc. 48) filed by Defendant, Jay Dardenne, in his official capacity as Secretary of State, against Plaintiffs the Libertarian Party, the Libertarian Party of Louisiana, Bob Barr, and Wayne Root, (hereinafter the "Libertarian Party") and the Socialist Party USA, Brian Moore, and Stewart Alexander (hereinafter the "Socialist Party"). Additionally before this court are a Motion to Amend Complaint (Doc. 44) and a Motion for Costs and Attorney's Fees under Rule 4(d) (Doc. 45), both filed by Plaintiffs against Defendant. Oral arguments were conducted on these motions on February 19, 2009. Jurisdiction exists pursuant to 28 U.S.C. § 1331.

Factual Background

On September 15, 2008, Plaintiffs filed a Complaint (Doc. 1) against Defendant contending actions of the Secretary of State violated the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, alleging that state closure of offices for non-essential purposes on September 2, 2008 (for the Socialist Party) and September 5, 2008 (for the Libertarian Party) and not affording a reasonable time thereafter for submission of qualifying papers to be placed on the Louisiana presidential election ballot, unconstitutionally denied them ballot access. The complaint alleged the Secretary of State's extension of the deadline for acceptance of qualifying papers through September 8, the first day the office was fully reopened, was null and void under U.S. Constitution, Art. II, § 1, cl. 2, and 42 U.S.C. § 1983; that failure to provide notice of the September 8 extension violated due process and 42 U.S.C. § 1983; and that the September 8 deadline was arbitrary and capricious and violated due process. Plaintiffs demanded declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 for alleged unconstitutional enforcement of allegedly ultra vires and arbitrary deadlines.

A hearing was held on September 22, 2008, on the motion for preliminary injunction, the request for temporary restraining order having been denied on September 16, 2008 (Doc. 4). The motion (Doc. 2) requested that the Secretary of State be ordered to cease and desist enforcement of the September 2 and

September 8 deadlines and accept the qualifying papers tendered by the Libertarian Party on September 10 and by the Socialist Party on September 11, and that the names of Bob Barr and Wayne Root (Libertarian Party) and Brian Moore and Stewart Alexander (Socialist Party) be placed on the Louisiana 2008 presidential election ballot.

After the hearing on September 22, 2008, the preliminary injunction was granted as to the Libertarian Party and denied as to the Socialist Party (Doc. 20). The Secretary of State was ordered to reprint the absentee by mail ballots for the presidential election in Louisiana to include the candidates and electors for the Libertarian Party. The ruling was stayed until September 25, 2008, to allow for appeal. The Secretary of State filed notice of appeal on September 25, 2008, and moved the Fifth Circuit, pursuant to Fed. R. App. P. 8, to stay the injunction pending appeal. On September 26, 2008, the Fifth Circuit granted the stay (Doc.28), finding that the Secretary of State had made a showing of likelihood of success on the merits of the appeal.

I. Mootness

Defendant argues that, with the occurrence of the November 4, 2008, presidential election, all issues in this case as presented in the Complaint (Doc. 1) are moot. Plaintiffs agree that any challenge to the

preliminary injunction is moot,[1] but believe that other issues in this case remain alive. Plaintiffs seek permanent relief declaring Defendant's September 2, 2008, and September 8, 2008, deadlines unconstitutional and permanently enjoining their enforcement. Plaintiffs also seek to add claims for damages in an amended complaint which was not included in the initial complaint.

"A claim becomes moot when 'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'"[2] Furthermore, as the Fifth Circuit noted in *Environmental Conservation Organization v. City of Dallas*[3]:

> "'Mootness is the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'[4] If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues

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[1] Appeal from the United States District Court for the Middle District of Louisiana (Doc. 61, p. 3 of 3).

[2] *Smith v. Winter*, 782 F.2d 508, 510 (5th Cir. 1986), citing *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491, 502 (1969).

[3] 529 F.3d 519, 524-525 (5th Cir. 2008).

[4] *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)).

> that it presents.[5] Therefore, before considering any other matters raised by the parties, we are obliged to "resolve the outstanding question as a threshold matter of jurisdiction.'"[6]

In deciding whether the entire complaint is moot, the parties agree that the Court must consider whether a recognized exception to the mootness doctrine for "the class of controversies capable of repetition yet evading review"[7] is applicable.[8] The exception can be invoked for the Complaint's (Doc. 1) claims for declaratory relief if two elements are met: "(1) [T]he challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same

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[5] *In Re Scruggs*, 392 F.3d at 128.

[6] *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 721 (5th Cir. 2007).

[7] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

[8] Plaintiffs cite the case of *Boagert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008), for the proposition that while the holding of an election moots interlocutory challenges to awards and denials of preliminary relief, "[d]ismissal of these preliminary-injunction appeals . . . does not render moot the underlying district court litigation." Thus, Plaintiffs argue that the "capable of repetition, yet evading review" doctrine can save Plaintiffs' claims to permanent prospective relief. However, as explained below, Plaintiffs' claims are not capable of repletion [sic], yet evading review and this doctrine is inapplicable.

complaining party would be subjected to the same action again."[9]

In *Center for Individual Freedom v. Carmouche*,[10] suit was brought under the Civil Rights Act, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201, and plaintiffs sought both injunctive and declaratory relief, the Fifth Circuit found that "Controversy surrounding election laws, including campaign finance regulations, is one of the paradigmatic circumstances in which the Supreme Court has found that full litigation can never be completed before the precise controversy (a particular election) has run its course," and that "suits challenging the validity of state election laws" satisfy the first prong of the exception.

Plaintiffs are correct that "suits challenging the validity of state election laws are classic examples of cases in which the issues are capable of repetition, yet evading review."[11] However, the Court agrees with Defendant that the requests for declaratory judgment made in the Complaint (Doc. 1) do not challenge the validity of state election laws, except as arising under a particular combination of events, events that are unusual and unlikely to occur again. The first request for declaratory relief does not challenge "the validity

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[9] *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975).

[10] 449 F.3d 655, 661 (5th Cir. 2006).

[11] *Id.*

of a state election law" but, rather, an action by the Secretary of State in extending the qualifying deadline to September 8, 2008. The second request for declaratory relief does challenge a state election law, setting the September 2, 2008 deadline, but only as applied in the unusual facts of this specific case, an office closure for non-essential purposes caused by a hurricane while the office remained open for essential purposes such as qualifying. Thus, this Court finds that this is not a "suit challenging the validity of a state election law" on its face so as to satisfy the first prong of the mootness exclusion.

In order for the second prong to apply (a reasonable expectation that the same complaining party would be subjected to the same action again) plaintiffs must make such a showing. Isolated actions do not fall under the exception to mootness. Requests for declaratory relief may sustain a suit only when the claims "challenge . . . some ongoing underlying policy" rather than "merely attack[ing] an isolated . . . action,[12] and a litigant should be able to "show the existence of an immediate and definite governmental action or policy that has adversely affected and *continues to affect* a present interest,"[13] in order for declaratory relief to save a suit from mootness.

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[12] *City of Houston v. HUD*, 24 F.3d 1421, 1429 (D.C. Cir. 1994).

[13] *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-126, 94 S.Ct. 1694, 1700, 40 L.Ed. 1 (1974) (emphasis added).

Plaintiffs believe that the focus of this situation should be "whether Defendant might again attempt to regulate elections."[14] However, the cases show that the likely to reoccur inquiry is directed to the plaintiff, the challenger of the law, whether the plaintiff will again be subjected to the same alleged injury, and not to the law itself. In *Weinstein v. Bradford*,[15] the Supreme Court enunciated the second prong of the exception as: "there was a reasonable expectation that the same complaining party would be subjected to the same action again." In *Center for Individual Freedom v. Carmouche*,[16] the Fifth Circuit recognized "the Court does not always focus on whether a particular plaintiff is likely to incur the same injury," but nonetheless still considered whether others in plaintiffs' position would be subjected to the challenged static condition, the challenged law.

In *Carmouche*, the Fifth Circuit stated that "precedent suggests that this case is not moot, because other individuals certainly will be affected by the continuing existence of the CFDA."[17] Neither the Plaintiffs in the instant case nor any other individuals have been or even can be shown to "be affected by the continuing existence" of anything. This

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[14] Plaintiffs' Response to Defendant's Motion to Dismiss / Doc. 52, p.8.

[15] 423 U.S. 147, 149 (1975).

[16] 449 F.3d at 662.

[17] *Id.*

Court believes that the isolated act of which Plaintiffs complain is not continuing in nature.

In *International Union v. Dana Corporation*[18] the Sixth Circuit found that a situation was not "capable of repetition" since "the combination of events which forced the [plaintiffs] to seek legal action . . . is unusual and unlikely to occur again."[19] In the instant matter, it is highly unlikely that Plaintiffs will again fail to qualify before the last day for qualifying for a presidential election, on days when the Secretary of State's office will be closed for non-essential purposes due to hurricane conditions, but open for the essential purposes of qualifying for a presidential election.[20] Therefore, this Court finds that the entire case presented by the Complaint (Doc. 1) is moot as it is not "capable of repetition", and there is no "reasonable expectation that the same complaining party would be subjected to the same action again."[21]

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[18] 697 F.2d 718 (6th Cir. 1983).

[19] *Id.* at 723.

[20] Additionally, had the office been completely closed during the end of the qualifying period, Louisiana law provides a method for "rescheduling of qualifying," allowing the Secretary of State to certify to the governor that a state of emergency exists, after which the Governor "may" issue and order to "delay any qualifying of candidates." La. R.S. 18:401.1.

[21] Plaintiffs are correct that in a motion to dismiss such as this one, they are entitled to the benefit of the doubt under *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007). That "benefit of the doubt", however, is not strong enough to overcome this Court's finding of mootness.

II. The Proposed Amendment

Federal Rule of Civil Procedure 15(a) provides that leave to amend pleadings "shall be freely given when justice so requires." Although Rule 15 "evinces a bias in favor of granting leave to amend,"[22] it is not automatic,[23] and a decision to grant leave is within the discretion of the trial court.[24] The trial court has the discretion to consider numerous factors in evaluating whether to allow amendment,[25] but a denial of leave to amend must be supported by a "substantial reason."[26]

As mentioned above, all issues in this case as presented in the Complaint (Doc. 1) became moot with the occurrence of the November 4, 2008 election. If allowed, this amendment will permit a case which has become moot, and over which this Court has no jurisdiction, to continue. This is certainly a "substantial reason" to deny the proposed amendment.

Plaintiffs argue that even if their claim for permanent prospective relief is moot their claim for

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[22] *Matter of Southmark*, 88 F.3d 311, 314 (5th Cir. 1996), *citing Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981).

[23] *Id.* citing *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993).

[24] *Id.* citing *Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1302-03 (5th Cir. 1995).

[25] *U.S. ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384, 391 (5th Cir. 2008).

[26] *Southmark*, 88 F.3d at 314.

money damages remains alive. This argument is without merit. In *Fox v. Board of Trustees of the State University of New York*,[27] the Second Circuit held that "once a case is moot, it is no longer justiciable in federal court and must be dismissed,"[28] and that "the district court did not abuse its discretion in denying Plaintiffs permission to amend their complaint after the case had become moot."[29] Before reaching this conclusion, the court stated that "the inability of the courts to provide relief to Plaintiffs . . . is logically dependent upon the absence of a claim for damages . . . "[30] The Plaintiffs in *Fox* argued that because they were seeking to recover nominal damages; they believed that the case was not moot. The Second Circuit disagreed, however, stating that this contention failed "primarily because there is absolutely no specific mention in [the Complaint] of nominal damages. Nor can a request of such damages be inferred from the language of [the Complaint]."[31]

Plaintiffs are correct that a damage claim may survive a mootness challenge.[32] However, Plaintiffs'

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[27] 42 F.3d 135 (2nd Cir. 1994).

[28] *Id.* at 144.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 141.

[32] *Harris v. City of Houston*, 151 F.3d 186, 191 n. 6 (5th Cir. 1998) (noting that a claim for "even nominal damages" can preserve a claim against a mootness challenge); *See also City of Los Angeles v. Lyons*, 461 U.S. (1980) (where the plaintiff was found to have standing to seek damages for past injuries caused by an

(Continued on following page)

argument that the proposed amendment in this case relates back to the date of the filing of the original complaint is incorrect. Since the Plaintiffs' original Complaint (Doc. 1) became moot before an amendment was allowed, "the federal courts have no jurisdiction over the litigation," and Plaintiffs now "lack a legally cognizable interest in the outcome."[33] The *Fox* case is not limited, as the Plaintiffs assert, to preventing only amendments adding plaintiffs after a complaint becomes moot, and Plaintiffs have failed to cite any authority saying otherwise.[34]

The Fifth Circuit case of *Gospel Lighthouse Church, Inc. v. City of Dallas*[35] is most factually on point. In *Gospel*, the Fifth Circuit upheld a district court grant of a motion to dismiss on mootness grounds; and upheld the district court denial of an amendment to the complaint, proposed after

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unconstitutional application of a chokehold even though he had no standing to pursue equitable relief to prevent choke-holds from being used in the future).

[33] *Fox*, 42 F.3d at 140.

[34] Plaintiffs claim that the amendment should be allowed based upon the case of *Building and Construction Trades Council of Buffalo, New York and Vicinity v. Downtown Development, Inc.*, 448 F.3d 138, 151 (2nd Cir. 2006). However, this case is inapplicable since damage claims in *Downtown Development* (in the form of civil penalty requests) had previously been made on the initial complaint, unlike in the instant case, where no damage claims had been presented to this Court prior to the case becoming moot.

[35] 999 F.2d 1580 (5th Cir. 1993).

mootness occurred, adding parties and a damage claim. The Fifth Circuit found:

> "We hold that in the particular circumstances of this case the district court did not abuse its discretion in finding that the mootness of the claim bars this suit."
>
> *****
>
> "'The requisite personal injury that must exist at the time of the commencement of the litigation (standing) must continue throughout its existence' . . . Moreover, the mootness doctrine requires that the controversy posed by the plaintiff's complaint be 'live' not only at the time the plaintiff files the complaint but also throughout the litigation process."
>
> *****
>
> "Gospel lost its personal stake in the outcome when the zoning change resolved its dispute. Thus, the resolution of Gospel's controversy by the zoning change renders this case moot and further litigation unnecessary."
>
> *****
>
> "Because the controversy has been resolved and the plaintiff/appellant's claims are therefore moot, federal subject matter jurisdiction no longer exists."
>
> *****
>
> "Because Gospel's claims are moot, there is no case or controversy."

The timing in *Gospel* is similar to the timing in this case. In *Gospel*, the initial complaint was filed, and after the zoning change, the case was found to be moot. Thereafter, the court denied Gospel's motion to permit an amended complaint joining additional parties and adding claims for damages. In the instant case, the initial complaint was filed, and with the occurrence of the election, this case has become moot. Thus, Plaintiffs are precluded from amending their complaint, and consequently, adding claims for damages.[36]

III. Costs and Attorney's Fees

The Complaint in the instant case (Doc. 1) was brought against Defendant, Jay Dardenne, in his official capacity as Louisiana Secretary of State. The United States Supreme Court has found that a suit against an official in his official capacity "is not a suit against the official personally, for the real party in interest is the entity.["][37] Dardenne, in his official capacity, is not a person to whom Fed. R. Civ. Pro. 4(d) applies, as that rule applies only to those subject

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[36] Since this Court finds that Plaintiffs are not permitted to amend their complaint based on the foregoing reasons, this Court need not address Defendants additional arguments in opposition to Plaintiffs' proposed amendment.

[37] *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed. 114 (1985).

to service under Rule 4(e), (f), or (h).[38] Service on a defendant sued in his official capacity must be made under Rule 4(j), as suing a state official in his official capacity is ultimately a suit against the state.[39] Therefore, Defendant's reliance on Fed. R. Civ. Pro. 4(j) as the appropriate method for service is reasonable, and Plaintiff's claim for costs and attorney's fees under Rule 4(d) is without merit.

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[38] Rule 4(e) concerns "an individual – other than a minor, an incompetent person, or a person whose waiver has been filed [who] may be served in a judicial district of the United States." Rule 4(f) applies to service on an individual in a foreign country. Rule 4(h) deals only with service upon "a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name."

[39] Plaintiffs cite a footnote from *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989) which states: "Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 71 n. 10. However, as explained by the Advisory Committee Notes to the 1993 Amendments to Fed. R. Civ. Pro. 4: "The request for waiver of service may be sent only to defendants subject to service under subdivision (e), (f), or (h). The United States is not expected to waive service for the reason its mail receiving facilities are inadequate to assure that the notice is actually received by the correct person in the Department of Justice, The same principle is applied to agencies, corporations, and officers of the United States and to other governments and entities subject to service under subdivision (j). Moreover, there are policy reasons why government entities should not be confronted with the potential for bearing costs of service in case in which they ultimately prevail."

Conclusion

Accordingly, the Motion to Dismiss Case as Moot (Doc. 48) by Defendant Jay Dardenne, in his official capacity as Louisiana Secretary of State, is hereby GRANTED. The Motion to Amend Complaint (Doc. 44) by Plaintiffs, the Libertarian Party and the Socialist Party, is hereby DENIED. The Motion for Costs and Attorney's Fees under Rule 4(d) (Doc. 45) by Plaintiffs, the Libertarian Party and the Socialist Party, is hereby DENIED.

Signed in Baton Rouge, Louisiana, on March 24, 2009.

/s/ J Brady
JUDGE JAMES J. BRADY
UNITED STATES
DISTRICT COURT
MIDDLE DISTRICT
OF LOUISIANA

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30307

LIBERTARIAN PARTY; LIBERTARIAN PARTY OF LOUISIANA; BOB BARR; WAYNE ROOT; SOCIALIST PARTY USA; BRIAN MOORE,

Plaintiffs-Appellants

v.

JAY DARDENNE, In His Official Capacity as Louisiana Secretary of State,

Defendant-Appellee

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

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(Filed Mar. 15, 2010)

ON PETITION FOR REHEARING EN BANC

(Opinion 1/21/2010, 5 Cir., _____, _____, F.3d _____)

Before STEWART, DENNIS, and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

3-15-2010

/s/ [Illegible]
United States Circuit Judge